

order of dismissal would operate as a bar. That question has not been argued before us and I do not think it is necessary that we should express any opinion on it. If there is going to be any difficulty it is one for which the appellants are wholly to blame. I would dismiss this appeal. On the question of costs this is clearly a matter for the discretion of the court and there is nothing in the circumstances of this case to suggest that this discretion has been wrongly exercised. The respondent shall have the costs here and below.

Appeal dismissed.

Solicitors: *Lim Kean Siew & Co.; Seenivasagam & Sons.*

NANYANG DEVELOPMENT (1966) SDN. BHD. v. HOW SWEE POH

[F.C. (Azmi L.P., Suffian & Ali F.J.J.) October 31, 1969]

[Kuala Lumpur — Federal Court Civil Appeal
No. X. 37 of 1969]

Land Laws — Caveat — Application for removal of private caveat — Onus of proof — Whether on registered proprietor or on caveator — Evidence Ordinance, 1950, ss. 101, 106 — National Land Code 1965, s. 327.

The question in this appeal was, "On whom does the onus lie to satisfy the court that it may remove a private caveat when the registered proprietor applies to the court under section 327 of the National Land Code for an order for its removal?" The learned trial judge ([1969] 1 M.L.J. 232) held that the caveat registered by the Registrar of Titles was proper and valid and that the appellant (the registered proprietor) had failed to prove that the respondent was not one of the persons specified in section 323 of the National Land Code. He therefore dismissed the application.

Held (Ali F.J. dissenting), allowing the appeal: the onus of proof in an application under section 327 of the National Land Code is on the caveator and it is for the caveator to satisfy the court that it is just for the caveat to remain; the burden is on the caveator to satisfy the court that he has good grounds for his alleged claim that he has a registrable interest in the land.

Cases referred to:-

- (1) *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. The Kingswood* [1941] 2 All E.R. 165, 179.
- (2) *Abrath v. The North Eastern Railway Co.* (1883) 11 Q.B.D. 440, 452, 457.
- (3) *A. L. S. Sadayappa Chettiar v. P. C. R. ML. Letchumanan Chettiar* [1951] M.L.J. 105, 106.
- (4) *Khoo Teck Yam v. Public Prosecutor* [1955] M.L.J. 112.

The following authorities were also cited: *Board of Education v. Rice* [1911] A.C. 179, 182; *Heywood v. B. D. C. Properties* [1963] 2 All E.R. 1063; [1963] 1 W.L.R. 975; *Innes' Registration of Title in the F.M.S.*, pp. 114-116; *C. P. R. v. District Registrar of Dauphin* [1956] 4 D.L.R. (2d) 518; *Baalmans' Singapore Torrens System* at p. 195; *In re Hinchcock* (1900) 4 W.N. (N.S.W.) 62, 63 (quoted by *Baalmans* at p. 193); *Curtis & Ruoff: "Registered Conveyancing"*, p. 777; *Hogg's Registration of Title* (1920): pp. 442 (section 184), 499 (s. 152), 536-537, 564-565 (s. 69), 597 (s. 152), 630 (s. 135); *Tee Chin Yong v. Jeff* [1963] M.L.J. 118; 20 *Halsbury's Statutes* (2nd Edn.) 1086; 1957 White Book, p. 938; *Re Meister* [1914] W.N. 390; *Sarkar on Evidence* (11th Edn.) Vol. 2, pp. 989-990.

A FEDERAL COURT.

Lim Kean Chye for the appellant.

D. S. Nath for the respondent.

Cur. Adv. Vult.

B *Azmi L.P.:* This is an appeal against the dismissal by the High Court of appellant's application for the removal of a caveat entered at the instance of the respondent, on the documents of title of certain lands of which the appellant was the proprietor.

C The application was obviously taken under section 327 and not under section 326 of the National Land Code. If the application had been made under section 326, the Registrar of Titles would then serve a notice of intended removal in Form 19C and remove the caveat at the expiry of the period of one month from the date of the notice unless, before the expiration of the period of one month the caveator has obtained an order of the court to extend further the said period. Section 327 provides that any person or body aggrieved by the existence of a private caveat may, at any time apply to the court for an order for its removal and the court may make such order on the application as it may think just. It would be seen that section 326 only refers to the power of the court to extend the period for the removal of the caveat whereas section 327 provides for power of the court to make any order in reference to a caveat, which power, would include the power to order removal or otherwise of the caveat. As I understood counsel for the respondent, his contention was if the appellant had taken action under section 326 then the burden would be on the respondent to prove that he has a registrable interest in the land but in this case as it was the appellant who took action under section 327 then the burden would be on it to prove that the respondent had no registrable interest.

E I am afraid I cannot understand this argument. Viscount Maugham in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corporation Ltd. The Kingswood*⁽¹⁾ dealing with the question of burden of proof in that case says this:

G "Agreeing with the trial judge, I think the burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is *ei qui affirmat non ei qui negat incumbit probatio*. It is an ancient rule founded on considerations of good sense, and it should not be departed from without strong reasons."

H That rule means "the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it: for a negative is usually incapable of proof."

The learned authors of *Sarkar on Evidence* express the view that section 101 of the Evidence Ordinance is based on that rule.

I The learned judge appeared to decide the matter on two questions.

- (1) That the caveat registered by the Registrar is proper and valid and
- (2) That the appellant had failed to prove that the respondent was not one of the persons specified in section 323 of the National Land Code.

In my view, he should have gone further into the matter and decide whether in this case the respondent, the caveator, has satisfied him that he has good grounds for his claim. In the first instance in his application for the entry of the caveat, Form 19B, he has to state in paragraph (2) of that form, the grounds of his claim to the registrable interest. The respondent's application in Form 19B however, is not included in this record of appeal, but I notice that in his affidavit in paragraph (6) the respondent had merely said: - "I am advised that my said caveat was rightly lodged as I claim a right to a registrable interest in the said land."

In my view he has not only to state his grounds but to substantiate them before the learned judge. I do not think it is the intention of the law that when a person enters a private caveat against a land he would not be required to prove that he has a good reason in law for doing that and that it should be on the part of the proprietor to satisfy the court that the caveator has not got good grounds for entering the private caveat. In my view therefore, the burden is on the respondent to satisfy the court that he has good grounds for his alleged claim that he had a registrable interest on the land, and all the appellant has to show is that it is the registered proprietor.

I would therefore allow the appeal, set aside the judgment of the court below and send it back to the court for a new trial. The respondent will pay the costs of the appeal. The costs of the previous trial will follow the result of the new trial.

Suffian F.J.: The question in this appeal is: on whom does the onus lie to satisfy the court that it may remove a private caveat when the registered proprietor aggrieved by its existence applies to the court under section 327 of the National Land Code for an order for its removal?

The respondent, who is a caveator, says that it lies on the appellant the registered proprietor. The learned judge agreed. The proprietor appeals, arguing that the onus lies on the caveator.

The facts of this appeal have been fully set out and there is no need for me to repeat them.

Difficulty has been caused by the fact that the National Land Code, which repealed and replaced the old land law, has nothing corresponding to section 170 of the old F.M.S. Land Code (Cap. 138) which clearly stated that the caveator must show cause why his caveat should not be withdrawn. The National Land Code is completely silent on the subject. The learned judge decided that he must presume that the caveat registered was proper and valid unless he was persuaded to the contrary, that it was for the proprietor to prove that the caveator was not one of the persons specified in section 323 of the Code, and there being no material placed before him to support the proprietor's application, he dismissed it.

In deciding this matter it is necessary to bear certain factors in mind. First, under our system of land tenure, the person for the time being registered as proprietor such as the appellant is almighty, and save in certain circumstances his title or interest is indefeasible.

A section 340, and he may deal with the land in any manner he thinks fit. Secondly, to protect the interest of a person who is also interested in the land, for example a person who has lent money on the security of the land, Part Nineteen of the National Land Code enables such a person to enter a private caveat effected by the endorsement on the register document of title. B When applying for the entry of the caveat he must specify on Form 19B the nature of the claim on which his application is based, section 323 (2). Thirdly, when the land authority receives the application it exercises a purely administrative function, because subsection (1) of section 324 expressly provides that it should not concern itself with the validity of the claim on which the application is based, and that it must grant the application by making the necessary endorsement on the register, together with a statement specifying among other things the extent of the caveat. A notice is then sent by the land authority to the proprietor in Form 19A which states among other things the effect of the caveat.

Put shortly, when land has been privately caveated D the proprietor cannot deal with it except usually after notice has been given to the caveator. If the proprietor thinks that the restraint on his dealings with the land is unjustifiable, he has one of two remedies open to him. Either he applies for the removal of the caveat to the Registrar under section 326 or he applies to the court under section 327. If he adopts the first course, the Registrar has no alternative but to give notice to the caveator and to remove the caveat at the expiry of one month specified in the notice, unless the court on the caveator's application extends the period of one month. If he adopts the second course, as has been done by the appellant, section 327 provides that the court may make such order as it may think just. That is all the section says: it is completely silent as to who should satisfy the court that it is just to remove the caveat or to let it remain. Is it for the proprietor to satisfy the court that it is just to remove the caveat or is it for the caveator to satisfy the court that it is just to let the caveat remain?

I am of the opinion that it is for the caveator to satisfy the court that it is just for the caveat to remain. G I say so because, first, as between the proprietor and the caveator, the proprietor is in a superior position; secondly, because the fact that the caveat has been entered on the register does not necessarily mean that the caveator's claim to restrain the proprietor's dealings with the land is necessarily valid in view of subsection (1) of section 324.

H Thirdly, the fact that the express provision of section 170 of the old F.M.S. Land Code (providing that it is for the caveator to show cause why the caveat should not be withdrawn) has not been repeated in the National Land Code, does not in my judgment justify the inference that the legislature intended to change the law — because there still remains section I 106 of the Evidence Ordinance which says that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. The respondent here may enter a caveat if, and only if, in the words of paragraph (a) of subsection (1) of section 323 he is a "person or body claiming title to, or any

registrable interest, in any alienated land or any right to such title or interest", and I am of the opinion that his caveat may remain on the register only if he is such a person or body. There is no question that the appellant is the registered proprietor of these lands. It is admitted that it has entered into an agreement to sell the lands to A, who subsequently in June 1967 assigned her rights to B. How does the respondent come into the picture? Apparently, so the appellant admits, because the respondent has a contract with C — which might or might not give rise to a claim to an interest in the lands. So far nobody has seen fit to disclose in these proceedings the terms of this agreement between C and the respondent. It is true that the appellant could, as suggested by counsel for the respondent, have got an idea of this agreement if he had applied for a copy of Form 19B on payment of the official fee. But why should the appellant bother to do this, especially as the information recorded on such a form must necessarily be brief? The respondent has this agreement and is aware of its terms, whereas the appellant has nothing to do with it; in these circumstances can it be denied that the terms of this agreement are especially within the respondent's knowledge? I do not think that it can and I am therefore of the opinion that this appeal be allowed. The order of the court is that this matter be remitted to the lower court with a direction that it enquire further into the appellant's application, bearing in mind that it is for the respondent to satisfy the court that it is just that the caveat remain on the register.

As regards costs, I also agree with my Lord President.

Ali F.J.: This is an appeal from the order dismissing the appellant's application under section 327(1) of the National Land Code, 1965 for the removal of a private caveat against its lands entered by the respondent. The five grounds for the application as set out in the originating motion are as follows:

- "(a) That the said respondent has no interest in the said lands;
- (b) That the said respondent does not have any right to claim title to or any registrable interest in the said lands or any right to such title or interest;
- (c) That the said respondent's claim if any arises from a contract between himself and Messrs. Modern Homes Sendirian Berhad. The applicant is not a party to this contract;
- "(d) That the said caveat was wrongly presented by the respondent; and
- (e) That the Registrar of Titles wrongly registered the caveat and has failed to notify the applicant of the presentation of the caveat pursuant to section 324 (3) of the National Land Code, 1965."

From all the grounds except (c) and its affidavit it seems clear that the appellant is in effect objecting to the registration of the caveat on the ground that the respondent was not one of the persons entitled, under section 323 of the National Land Code, to enter a caveat. As registered proprietor of the land there was, of course, nothing to prevent the appellant from applying to the registrar under section 326 of the National Land Code to have the caveat removed. Section 326 provides:

A "326. (1) Any person or body whose land or interest is bound by a private caveat may at any time apply to the Registrar for its removal pursuant to this section, and the Registrar shall —

- (a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and
- (b) subject to sub-section (2), remove the caveat at the expiry of the period of one month specified in that notice.

B (2) The court may, on the application of any person or body on whom such a notice has been served (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of one month; and the Registrar, on being duly served with any order of the court under this sub-section, shall not remove the caveat until the expiry of the said period as thereby extended.

C (3) The Registrar shall remove any caveat pursuant to this section by cancelling the entry thereof on the register document of title, and noting thereon the reason for the cancellation and the date thereof.

(4) Every cancellation under sub-section (3) shall be signed and sealed."

D If it had so applied the usual notice would have been issued and the respondent, in order to perpetuate the caveat, would have to obtain an order from the court. In these circumstances, there can be no doubt that the respondent would be required to satisfy the court as to the grounds for extending the caveat beyond the period fixed by the Registrar's notice. But the appellant did not invoke section 326 but chose to proceed under section 327 of the Code which provides:

E "327. (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

(2) The Registrar shall, on being duly served with any order under this section for the removal of a caveat, cancel the entry thereof on the register document of title, and note thereon the reason for the cancellation and the date thereof.

(3) Every cancellation under sub-section (2) shall be signed and sealed."

G In terms of this section an applicant has to be an aggrieved person, i.e., a person who is aggrieved by the existence of the caveat because it adversely affects him in the sense that he is prevented from dealing with his right or interest in the land under caveat. This section even allows *ex parte* application which means that the court can order removal of the caveat in the absence of the caveator. As to when such an order can or cannot be made this depends on the circumstances of each particular case. In this case the appellant's affidavit disclosed that it has entered into an agreement for the sale of the land in question to one Hanne Lee (f) who in turn has assigned her rights under the agreement to Modern Homes Sendirian Berhad. That, clearly is an admission that the appellant has no more right in the land to deal with and in the event has no reason to say that it is being prevented by the caveat from dealing with such right. In paragraph 7 of its affidavit the appellant states that the existence of the caveat prohibits the transfer of title. Of course, it does for that is the function of the caveat. *Hogg on Registration of Title to Land* throughout the Empire, 1920 Edition, said on page 189:

"...A caveat is in the nature of a statutory injunction, and is a means of conveying notice to persons who propose to

deal with the owner that there are other claims affecting the property; in itself a caveat makes a claim or right neither better nor worse, but marks a point of time at which the merits of competing interests may be judicially determined."

So also was said by John Baalman in his book on the Torrens System in Singapore, on page 193:

"... Torrens System replaces the equitable doctrine of notice with the statutory doctrine of notification. In the doctrine of notification, caveats play an important part. The owner of an equity who would be protected under the general law by the doctrine of notice must, under the Torrens System, protect himself by having his interest notified on the land-register."

The general function of a caveat is to suspend the process of registration until conflicting claims have been settled."

But the question is can an order under section 327 of the National Land Code be made upon the evidence before the court? I think not.

The learned trial judge dismissed the application on the ground that the appellant had failed to discharge the onus of proving that the respondent was not one of the persons entitled to lodge a caveat under section 323 of the National Land Code. This section provides:

"323. (1) The persons and bodies at whose instance a private caveat may be entered are —

- (a) any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest;
- (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

(2) Any such person or body wishing to apply for the entry of such a caveat shall do so in Form 19B, specifying therein the nature of the claim on which his application is based, and whether the caveat is to be expressed to bind the land itself or a particular interest only.

(3) Any application under this section shall be accompanied by the prescribed fee and, so far as it sets out the claim giving rise thereto, be verified by a statutory declaration by the applicant or his advocate and solicitor."

The learned trial judge dealt with this case in the way he did probably because the respondent in his affidavit has maintained that the caveat was rightly lodged as he claims a right to a registrable interest in the land. As section 323 permits a person claiming a right to an interest in the land to lodge a caveat, the learned trial judge rightly assumed that the caveat as registered by the Registrar is proper and valid. Thereupon it was concluded that unless the appellant was able to prove the contrary, his application must fail. It was on that basis this matter was apparently argued in the court below and it is on the same basis that we are asked to consider this appeal.

In my judgment even so the basis stated the appellant cannot succeed. So far as it is a party seeking relief the onus is clearly on them to satisfy the court that it is entitled to relief. Section 102 of the Evidence Ordinance provides that in a suit or proceeding the proof lies on the person who would fail if no evidence was given on either side. Here the appellant's affidavit merely contained allegations that the respondent has no right to enter the caveat. The

respondent has countered by saying that he has a right. In the event it was clearly for the appellant to prove the allegation, negative though it may be. Brett M.R. said in *Abrath v. The North Eastern Railway Company*.⁽²⁾

"But then it is contended (I think fallaciously,) that if the plaintiff has given *prima facie* evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give *prima facie* evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts; the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty — suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him."

In the same case Bowen L.J. clearly illustrated the principle by saying on page 457 thus:

"... Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The term "negative" and "affirmative" are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Whenever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively."

The words of the Master of Rolls were quoted with approval in *A. L. S. Sadayappa Chettiar v. P. C. R. ML. Letchumanan Chettiar*.⁽³⁾ The following passage from *Woodroffe & Ameer Ali*, 9th Edition, page 704, is also relevant:

"But in order to determine the burden of proof it is necessary to look for the affirmative in substance of the issue and not the affirmative in form. Thus a legal affirmative is by no means necessarily a grammatical affirmative, nor is a legal negative always a grammatical negative. Allegations essential to the support of a party's case, although negative in form, may be affirmative in reality; and the nature of language is such that the same proposition may in general be expressed at pleasure in an affirmative or negative shape. The rule may therefore more correctly be laid down that the issue must be proved by the party who states the affirmative in substance and not merely the affirmative in form."

Alternatively the appellant has contended that by reason of section 106 of the Evidence Ordinance the onus of proof lies on the respondent. It is said in

Sarkar on Evidence, on page 916, that this section is an exception to the general rule laid down in section 101 that the burden of proving facts rests on the party who substantially asserts the affirmative of the issue. It is not intended to relieve any person of that duty or burden. Bowen L. J. in *Abrath v. The North Eastern Railway Company*, *supra*, said of this exception to the general rule at page 457 in these words:

"It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds."

This passage of the judgment is discussed in *Sarkar* on Evidence on pages 916 and 917 along with other decisions on the same point and it is there said that the authorities do not appear to be agreed as to the extent of the general rule that where a particular fact is peculiarly within the knowledge of the opposite party, the burden of proving it lies on him. But *Sarkar* seems to be of the view that the most practical and reasonable way of applying section 106 is to adopt the words in *Phipson*, 8th Edition, page 34, which are as follows:

"in the absence of statutory provision, the better opinion now seems to be that, in general, some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary."

These words were apparently followed in the local case of *Khoo Teck Yam v. Public Prosecutor*.⁽⁴⁾

In the result I would uphold the conclusion of the learned trial judge and dismiss this appeal with costs.

Appeal allowed. New trial ordered.

Solicitors: *Lim Cheng Ean & Co.; Nath & Co.*

PENINSULAR LAND DEVELOPMENT SDN. BHD. v. K. AHMAD

[F.C. (Azmi L.P., Suffian & Ali F.J.) October 31, 1969]

[Penang — Federal Court Civil Appeal No. X.47 of 1969]

Practice and Procedure — Action for specific performance of contract of sale — Application for summary judgment — Whether defendant had good defence on merits — Whether agreement of sale severable from building agreement — Construction contra proferentum — R.S.C. 1957, O. 14A.

The parties in this case had entered into two agreements, one an agreement for the sale of a piece of land and the other a building agreement under which the appellant company agreed to build a dwelling house on the said piece of land. The respondent had paid all the instalments on the sale agreement and all the instalments but two on the building agreement. The appellant company was unable owing to difficulties with its building contractor to complete the building. The respondent applied for specific performance of the agreement for sale. On an application for summary judgment the learned trial judge made an order in terms of the statement of claim as he took the view that the two agreements were distinct and severable and he declined to accept the appellant's contention that there was a triable issue or

A that there was a difficult question of construction involved. On appeal it was contended that the appellant had a good defence to the action on the merits. It was argued that the learned trial judge was wrong in holding that the two agreements were distinct and severable and that the appellant was entitled to show that the agreement for sale could not be completed independently of the building agreement.

B Held (Ali F.J. dissenting), dismissing the appeal: on the admitted facts there was no triable issue and the learned trial judge was right in holding that the agreements were distinct and severable and in granting the plaintiff-respondent leave to sign final judgment.

Cases referred to:-

- (1) *Saw v. Hakim* 5 T.L.R. 72.
- (2) *Ironclad etc. Co. v. Gardner* 4 T.L.R. 18.
- (3) *Bachan Singh v. Mahinder Kaur* [1956] M.L.J. 97 & 98.
- (4) *Lysaght v. Edwards* [1876] 2 Ch. D. 499.
- (5) *Haji Osman bin Abu Bakar v. Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
- (6) *Symons v. James* (1842) 62 E.R. 983.
- (7) *Barrett v. The Duke of Bedford* (1800) 101 E.R. 1569.
- (8) *Edis v. Bury* (1827) 108 E.R. 511.
- (9) *Jacobs v. Booths Distillery* (1901) 85 L.T.R. N.S. 262.

The following authorities were also cited: *Manks v. Whitley* [1912] 1 Ch. 735, 754; *Cow v. Cassey* [1949] 1 K.B. 474, 481; *Reigate v. Union Manufacturing Co.* [1918] 1 K.B. 605; 17 E. & E. Digest 298, para. 1033 *contra proferentum* 1035; *Dane v. Mortgage Insurance Corporation* [1894] 1 Q.B. 54; *Nassau* 70 L.T.R. 376; *Anglo-Italian Bank v. Wells* (1878) 38 L.T.R. 197; *Hobson v. Monks* [1884] W.N. 8; *Smith v. Chadwick* (1881-82) 20 Ch. D. 27, 62; *Odessa Tramways Co. v. Mendel* (1878) 8 Ch. D. 235, 244; *Sir Lindsay Perkinson & Co. Ltd. v. Commissioners of His Majesty's Works and Public Buildings* [1949] 2 K.B. 632; 665; [1950] 1 All E.R. 208, 228; *Metropolitan Water Board v. Dick Kerr & Co. Ltd.* [1918] A.C. 119; *Codd v. Delap* (1905) 92 L.T. 510 511; *Bowes v. Caustic Soda & Chlorine Syndicate* (1892-93) 9 T.L.R. 328; *Electric & General Contract Corporation v. Thomas Henston Electric Co.* (1893-94) 10 T.L.R. 103; *Perak Iron Mining Co. Ltd. v. Chong Voon Kim* [1962] M.L.J. 270; *Thorne v. Seel* [1878] W.N. 215; *Luen Heng & Co. v. Oakes* [1966] 1 M.L.J. 14; *Heng Weng Kong v. Nabishah* [1966] 2 M.L.J. 115; *Town House Hotel Ltd. v. Shanghai Hall Ltd.* [1966] 2 M.L.J. 169; [1967] 1 M.L.J. 223; *Roberts v. Plans* (1885) 1 Q.B.D. 597; *Sharikat Bakti Ltd. v. Gurbachan Singh* [1966] 2 M.L.J. 269; [1967] 1 M.L.J. 235; *Hajara Singh v. Muthukaruppan Chettiar* [1967] 1 M.L.J. 167; *Kok Swee Teng & Anor. v. Perola Navigation Trading Co. Ltd.* [1969] 1 M.L.J. 95.

FEDERAL COURT.

R. C. Hoffman (Dr. Ahmad Ibrahim with him) for the appellant.

P. J. Mooney for the respondent.

H

Cur. Adv. Vult.

Azmi L.P.: The two parties executed two agreements which may be referred to respectively as the "sale agreement" and the "building agreement". Under the sale agreement the defendant, a developing company agreed to sell a plot of land to the plaintiff for \$30,000 payable in instalments which at the date of the suit, had been paid in full. Under the building agreement the defendant agreed to build a dwelling house on the said land for \$49,000 payable in six progress payments, each to be made when demanded by the defendant. No time was fixed for the erection of the house because clause 3 of the building agreement pro-

I